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BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 91-58
Table of Allotments,	)	
FM Broadcast Stations,	)	RM-7419
(Caldwell, College Station and	)	RM-7797
Gause, Texas)	)	RM-7798

To: The Commission

## OPPOSITION TO MOTION TO STRIKE

Bryan Broadcasting License Subsidiary, Inc. ("Bryan"), by its attorneys, hereby opposes the Motion to Strike the Supplement to Comments on Remand that Roy E. Henderson filed on December 8, 1999. The Supplement to Comments on Remand was filed merely to report that the FAA had approved the tower site to be used by Bryan. As set forth below, Bryan believes that the transmitter site it has selected at the *application* stage has no direct relevance to this allotment proceeding. However, since Henderson continues to make an issue of Bryan's site in this *allotment* proceeding in order to deflect scrutiny from the infirmities in its proposed allotment, Bryan feels compelled to keep the Commission informed about the progress of its application. Henderson's Motion to Strike's only value is that of entertainment, not of sound legal argument. For the reasons discussed below, the Commission should deny Henderson's Motion to Strike.

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## **Discussion**

### **I. Bryan's Site Change Amendments Are Permitted In This Situation.**

In his Motion to Strike, Henderson, for what seems like the hundredth time, argues that the Commission should not accept the site change amendments that Bryan filed after this proceeding was remanded to the FCC. Henderson is wrong. Bryan's site change amendments are not being filed as part of this rulemaking proceeding. The filings are part of Bryan's *application* proceeding, not its *allotment* proceeding. As a permittee, Bryan has the right to choose any site it wants in an application proceeding, and to change transmitter sites should it so choose, or should circumstances demand. This is the same right that every permittee or licensee has with respect to any transmitter site selection it applies for, as long as the application itself does not propose a change in the Table of Allotments. As there is no stay of the effect of the rulemaking, Bryan has every right to prosecute its application for a suitable transmitter site.

The sole relevance of Bryan's site change application to this proceeding is to demonstrate the wisdom of the Commission's distinction in the showings that proponents must make in allotment proceedings versus those that must be made at the application stage.

The Commission requires that any change in the Table of Allotments, whether it be through a rulemaking proceeding or a "one-step" application proceeding, have a hypothetical reference point at which the allotment will be fully spaced and will provide a city-grade signal to cover all of its city of license.<sup>1</sup> However, for a myriad of reasons, stations are constantly being forced to change transmitter sites, and such site changes are accomplished through an *application* proceeding in which

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<sup>1</sup> *Amendment of Commission's rules to Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735, 73 RR2d 247, at ¶ 13 (1993) (in one-step applications, sites providing full mileage separation and city-grade coverage must be specified even if not actually used by the applicants, to insure that parties do not "receive modifications by using the one-step process that which would be denied under the two-step process.")

there is no consequence for not fully covering the city of license. For example, in *Greenwood, South Carolina*, 3 FCC Rcd 4108 (1988), the Commission stated that a failure to fully cover the city of license will only be a fatal defect at the allotment stage, not at the application stage. The Commission also provided a full justification for why allotment requests and application filings are treated differently. *Id.* In the words of the Commission:

[C]onsideration is generally limited to the application context [because] [i]t is only at that stage that the Commission has before it the information necessary to make informed judgments. The Commission generally cannot, in the course of rule making proceedings, evaluate the actual transmitter sites that will be specified in applications not yet filed. . . . [C]onsideration . . . at the allotment stage would, thus, be premature.

*Id.* at para. 7. Moreover, as demonstrated by this very case, providing an allotment with a fully spaced referenced coordinate allows applicants to pick and choose sites as circumstances - such as FAA approval - demand, and still maintain a high degree of city-grade coverage. In contrast, Henderson's allotment, relying as it does on a single site where, at best, using the most optimistic prediction methodology, he can provide city coverage to only 97% of his city of license, any change in site will, by necessity, result in a degraded allotment. One that is already substandard can only get worse.

Henderson's arguments, if adopted, would result in the radical revision of the Commission's allotment policies, both in rulemaking proceedings and in one-step upgrades. Short-horned FM allocations, not able to cover their cities of license, would proliferate. The effects of Henderson's argument would not be limited in scope to this isolated proceeding, but instead would have broad ramifications. As Henderson has provided no good reason for the Commission to depart from its well reasoned precedent, its argument must be rejected.

Bryan's amendment merely demonstrated that a useable site, approved by the FAA has been found by Bryan, and will be used to construct the upgrade facilities of KTSP. Consequently, Henderson's allegation that Bryan's amendment cannot be accepted by the Commission is wrong.

This argument, which is the main theme of Henderson's Motion to Strike, is erroneous; therefore, the Motion to Strike should be denied.

**II. Bryan Cannot Be Accused Of Misrepresentation Or A Lack Of Candor.**

In his Motion to Strike, Henderson once again accuses Bryan of misrepresentation based on Bryan's specification of particular transmitter sites in an application filed with the Commission. Henderson's argument is completely irrelevant to the rulemaking proceeding. Moreover, even in the application proceeding, the Commission will find Henderson's concerns to be misplaced. Bryan has already responded to the allegations of Henderson in a pleading filed on June 4, 1999 ("Opposition to Informal Objection and Motion to Deny Application or Designate Application for Evidentiary Hearing"), in which it demonstrated that any inaccuracies were innocent mistakes, not any nefarious attempt to mislead the Commission, as Henderson would have people believe.

Any concerns Henderson has with Bryan's *applications* will be addressed by the Mass Media Bureau processing staff dealing with the application. These concerns are simply irrelevant to the rulemaking proceeding where the issue is not the qualifications of the applicant, but instead the public interest benefits of service to be provided by a particular allotment. The qualifications of the proponents of the allocation are not considered, only the benefits of the allotment is of concern in deciding which allotment proposal to select. *See Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Lafayette, Louisiana)*, 10 FCC Rcd 3253 (1995) (Commission states that a challenge to the qualifications of a proponent are only "cognizable" in a licensing proceeding, not an allocation proceeding).

Again, Henderson's allegations should be dismissed, and his Motion to Strike must be denied.

**Conclusion**

For the reasons set forth above, the Commission should deny Henderson's Motion to Strike and grant Bryan's above-referenced rulemaking proposal.

Respectfully submitted,

**BRYAN BROADCASTING LICENSE  
SUBSIDIARY, INC.**

By: 

David D. Oxenford  
JoEllen Masters

Its Attorneys

FISHER WAYLAND COOPER LEADER  
& ZARAGOZA L.L.P.  
2001 Pennsylvania Avenue, N.W.  
Suite 400  
Washington, D.C. 20006  
(202) 659-3494

Dated: December 22, 1999

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## **CERTIFICATE OF SERVICE**

I, Karleen Lamie, do hereby certify that I have this 22nd day of December, 1999, mailed by first-class United States mail, postage prepaid, copies of the foregoing “**Opposition to Motion to Strike**” to the following:

\*Christopher Wright, Esq.  
Office of the General Counsel  
Federal Communications Commission  
445 12th Street, S.W., Room 8-C755  
Washington, D.C. 20554

\*Gregory M. Christopher, Esq.  
Office of the General Counsel  
Federal Communications Commission  
445 12th Street, S.W., Room 8-A741  
Washington, D.C. 20554

\*Robert Hayne, Esq.  
Office of the General Counsel  
Federal Communications Commission  
445 12th Street, S.W., Room 3-A262  
Washington, D.C. 20554

John E. Fiorini III, Esq.  
Gardner Carton & Douglas  
1301 K Street, N.W., Suite 900  
Washington, D.C. 20005

Robert J. Buenzle, Esq.  
Law Offices of Robert J. Buenzle  
12110 Sunset Hills Road, Suite 450  
Reston, VA 20190

Christopher Sprigman, Esq.  
U.S. Department of Justice  
Antitrust Division  
Appellate Section, Room 10535  
Patrick Henry Building  
601 D Street, N.W.  
Washington, D.C. 20530

Meredith S. Senter, Esq.  
Leventhal, Senter & Lerman, P.L.L.C.  
2000 K Street, N.W., Suite 600  
Washington, D.C. 20006-1809

Judith A. Mather, Esq.  
Dow, Lohnes & Albertson, P.L.L.C.  
1200 New Hampshire Avenue  
Washington, D.C. 20036-6802

  
Karleen Lamie

**\*Hand Delivery**